Mayflower Acme Tours Sdn Bhd v Ngiam Foon and another suit

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO NOS D8–22–880 OF 2006 AND S-22–708 OF 2009
HAMID SULTAN J
10 FEBRUARY 2012

Civil Procedure — Abuse of process — Circumstances — Whether plaintiff used court process in frivolous and vexatious manner to oppress defendant — Defendant won case against plaintiff for constructive dismissal in Industrial Court — No allegation then raised that defendant breached fiduciary and fidelity duties to plaintiff — Plaintiff unhappy defendant allegedly caused employees to leave to join rival company — Whether raising old allegations of breach of duties in civil suit five years after defendant left plaintiff showed mala fides and vindictiveness

The common defendant in the consolidated suits, Ngiam Foon, was a non-shareholder director and, at different times, general manager and deputy general manager of the plaintiff. The second to the tenth defendants in suit '708–2009' (including Normah bt Kadir when she was alive) were all employees of the plaintiff. They left the plaintiff in January/February 2003 to join the 11th defendant ('AE Tours'), the plaintiff's competitor. Normah bt Kadir left the plaintiff's employ in December 2002 to join AE Tours while Ngiam Foon left in December 2003 to join a holding company of AE Tours. In its suit, the plaintiff alleged Ngiam Foon had breached fiduciary duties and the duty of fidelity to act faithfully and honestly in the best interests of the plaintiff while serving as its director, general manager or employee by, inter alia, having encouraged, induced or caused 22 of the plaintiff's employees to leave and join AE Tours; causing the third to the tenth defendants in suit '708–2009' to be accorded preferential treatment when they resigned from the plaintiff company and for committing other acts detrimental to the plaintiff's interests. Ngiam Foon and the other said defendants were accused of conspiring to defraud and injure the plaintiff by setting up AE Tours while they were still employed with the plaintiff and using the plaintiff's confidential business information and contacts, suppliers and customers to develop the business of AE Tours. In their defence, the defendants said Ngiam Foon was awarded compensation by the Industrial Court for having been constructively dismissed by the plaintiff in December 2003, yet none of the plaintiff's allegations in the instant suits were raised during the Industrial Court proceedings or when the award was judicially reviewed and affirmed by the High Court. The allegations were also not raised when Ngiam Foon was employed with the plaintiff. The defendants alleged the instant suits, having been filed after the Industrial Court award and

in respect of alleged offences or misconduct that happened in 2002–2003, were an afterthought and showed mala fide intent.

Held, dismissing the claim with costs:

(1) The plaintiff's complaints were not bona fide and were an afterthought and a vindictive attempt to oppress Ngiam Foon further, using the court in a frivolous and vexatious manner with no corporate decency or conscience. It was a frown upon industrial jurisprudence considering Ngiam Foon's contribution to the plaintiff during his term of office (see para 13(i)).

(2) The primary complaint related to Ngiam Foon's conduct and/or motives on managerial decisions. If genuine, it ought to have been brought up at the earliest opportunity. To say it was only discovered pursuant to an audit, and that, too, done in 2007, when these matters ought to have been ventilated by the manager and directors involved in the running of the business at the earliest opportunity, lacked bona fides (see para 13(c).

(3) None of the plaintiff's directors who were instrumental in the running of the plaintiff gave evidence. This was fatal considering the factual matrix of the case and the fact the plaintiff's allegations were related to Ngiam Foon's conduct and motives in the decision-making process of the plaintiff (see para 13(d)).

(4) Ngiam Foon was only a director and not a shareholder. A claim for breach of fiduciary duty and/or fidelity in decision-making process after five years, more so when there was an immediate Board of Directors (who were shareholders) in the hierarchy supervising the ordinary course of business, must be taken into consideration in assessing the bona fides of the plaintiff's case (see para 6).

(5) None of the plaintiff's witness statements set out the elements of breach or tort complained of. The statements and the evidence was sketchy and consisted of hearsay, speculative views, surmise and conjecture and had no probative value. There were no contemporaneous documents or notes of the material time that had been circulated among the directors and key managerial staff that Ngiam Foon had misconducted himself in his managerial or directorial positions (see para 12).

(6) The plaintiff filed this suit about five years after Ngiam Foon had left its employ. There was no contemporaneous objection at any point of time, more so when there was an Industrial Court case between the plaintiff and Ngiam Foon commenced as early as 2004 (see para 3).

[Bahasa Malaysia summary

Defendan bersama dalam guaman yang disatukan, Ngiam Foon, adalah pengarah yang tidak memegang saham dan pada masa-masa yang berlainan,

pengurus besar dan timbalan pengurus besar plaintif. Defendan-defendan kedua hingga kesepuluh di dalam guaman '708–2009' (termasuk Normah bt Kadir semasa dia masih hidup) adalah kesemuanya pekerja plaintif. Mereka meninggalkan plaintif pada Januari/Februari 2003 untuk bekerja dengan defendan ke-11 ('AE Tours'), pesaing plaintif. Normah bt Kadir meninggalkan pekerjaan dengan plaintif pada Disember 2002 untuk bekerja dengan AE Tours manakala Ngiam Foon keluar pada Disember 2003 untuk bekerja dengan syarikat induk AE Tours. Di dalam guaman ini, plaintif mendakwa Ngiam Foon telah memungkiri kewajipan fidusiarinya dan kewajipan kesetiaannya untuk bertindak dengan setia dan jujur dalam kepentingan terbaik plaintif semasa bekerja sebagai pengarah, pengurus besar atau pekerja dengan, antara lain, menggalakkan, mendorong atau menyebabkan 22 orang daripada pekerja plaintif berhenti dan bekerja dengan AE Tours; menyebabkan defendan-defendan ketiga sehingga kesepuluh di dalam guaman '708-2009' diberikan keistimewaan apabila mereka meletakkan jawatan daripada syarikat plaintif dan kerana melakukan lain-lain tindakan yang memudaratkan terhadap kepentingan plaintif. Ngiam Foon dan defendan-defendan lain dituduh bersepakat untuk menipu dan menjejaskan plaintif dengan menubuhkan AE Tours semasa mereka masih bekerja dengan plaintif dan menggunakan maklumat sulit dan hubungan perniagaan, pembekal-pembekal dan pelanggan-pelanggan plaintif untuk mengembangkan perniagaan AE Tours. Dalam pembelaan mereka, defendan-defendan menyatakan bahawa Ngiam Foon telah diberikan pampasan oleh Mahkamah Perusahaan kerana ditamatkan kerja secara construktif oleh plaintif pada Disember 2003, tetapi tidak ada satu pun dakwaan plaintif di dalam guaman-guaman ini dibangkitkan semasa prosiding Mahkamah Perusahaan atau apabila award tersebut disemak secara kehakiman dan disahkan oleh Mahkamah Tinggi. Dakwaan-dakwaan tersebut juga tidak dibangkitkan apabila Ngiam Foon bekerja dengan plaintif. defendan-defendan mendakwa bahawa guaman ini, yang difailkan selepas award Mahkamah Perusahaan dan berkaitan dengan kesalahan yang didakwa atau salah laku yang berlaku dalam tahun 2002–2003, adalah fikiran semula dan menunjukkan niat jahat.

Diputuskan, menolak tuntutan dengan kos:

(1) Aduan plaintif tidak bona fide dan adalah fikiran semula dan cubaan penuh dendam untuk terus menganiaya Ngiam Foon, dengan menggunakan mahkamah dengan cara yang remeh dan menyusahkan tanpa tatasusila dan hati nurani. Adalah merisaukan dari segi jurisprudens perusahaan menimbangkan sumbangan Ngiam Foon kepada plaintif semasa tempoh pekerjaannya (lihat perenggan 13(i)).

(2) Aduan utama melibatkan tindakan dan/atu motif Ngiam Foon berkaitan keputusan pengurusan. Jika sahih, ia sewajarnya dibangkitkan pada peluang yang paling awal. Untuk mengatakan bahawa ia hanya diketahui berikutan audit, dan ia juga, dibuat dalam tahun 2007, apabila

perkara-perkara ini sewajarnya disuarakan oleh pengurus dan pengarah-pengarah yang terbabit dalam pengurusan perniagaan pada peluang yang paling awal, tidak menunjukkan niat baik (lihat perenggan 13(c)).

(3) Tidak ada seorang pun daripada pengarah-pengarah plaintif yang berperanan penting dalam pengurusan plaintif memberikan keterangan. Ini adalah memudaratkan melihatkan fakta matriks kes dan fakta dakwaan plaintif adalah berkait dengan tindakan dan motif Ngiam Foon dalam proses membuat keputusan plaintif (lihat perenggan 13(d)).

(4) Ngiam Foon adalah satu-satunya pengarah dan bukan pemegang saham. Tuntutan untuk kemungkiran kewajipan fidusiari dan/atau kesetiaan dalam proses membuat keputusan selepas lima tahun, atau lebih-lebih lagi apabila terdapat Lembaga Pengarah yang terkini (yang adalah pemegang saham) di dalam hierarki yang menyeliakan perjalanan perniagaan yang biasa, mesti dipertimbangkan dalam menilai niat baik kes plaintif (lihat perenggan 6).

(5) Tidak ada satu pun kenyataan saksi plaintif mengemukakan unsur kemungkiran atau tort seperti yang diadu. Kenyataan-kenyataan dan keterangan adalah ringkas dan termasuk dengar cakap, pendapat berspekulasi, agakan dan tekaan dan tidak mempunyai nilai probatif. Tidak ada dokumen semasa atau nota-nota pada masa material yang telah diedarkan di antara pengarah-pengarah dan kakitangan pengurusan yang penting bahawa Ngiam Foon telah melakukan salah laku dalam kedudukannya sebagai pengurus atau pengarah (lihat perenggan 12).

(6) Plaintif memfailkan tindakan ini lebih kurang lima tahun selepas Ngiam Foon berhenti kerja. Tidak ada bantahan semasa pada bila-bila masa, lebih-lebih lagi apabila terdapat kes Mahkamah Perusahaan di antara plaintif dan Ngiam Foon yang dimulakan seawal 2004 (lihat perenggan 3).]

Notes

For a case on circumstances, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 14.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors & another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

Caley Ototo Worldwide Sdn Bhd v Sun Wen Long [2009] 9 MLJ 1; [2010] 1 CLJ 725, HC (refd)

Chan Yoke Lain (administrator of the estate of Chong Yoke Fah deceased) v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303, CA (refd)

Datin Peggy Taylor v Udachin Development Sdn Bhd [1984] 1 MLJ 85 (refd)
Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)
Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors & another appeal [2005] 6 MLJ 540 ; [2005] 3 CLJ 753, CA (refd)
MPI Polyester Industries Sdn Bhd v Eng Koo Kiang & Ors [2011] 8 CLJ 236, HC (refd)
Magnifine Sdn Bhd v Yap Mun Him [2005] 6 CLJ 413, CA (refd)
Markwell Bros Pty Ltd v CPN Diesel (Qld) Pty Ltd & Ors (1982) 7 ACLR 425 (refd)
Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd & Ors [2008] 8 MLJ 450; [2008] 9 CLJ 546, HC (refd)
Rayner Segismond Balagut & Anor v Saaid bin Abdullah & Ors [2012] 7 MLJ 55, HC (refd)
SCK Group Bhd & Anor v Sunny Liew Slew Pang & Anor [2011] 4 MLJ 393; [2010] 9 CLJ 389, CA (refd)
Schmidt Scientific Sdn Bhd v Ong Han Suan [1997] 5 MLJ 632, HC (refd)
Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors [1999] 5 MLJ 421, HC (distd) (refd)
Tenaga Nasional Bhd v Kesang Trading Sdn Bhd & Ors [2002] 6 MLJ 1, HC (refd)
Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297, HC (refd)

Wong Chong Wah (Harold Tan and Sarah Kate Lee with him) (Skrine) for the plaintiff.
Alvin John (S Viknesh with him) (Alvin John & Partners) for the defendants.

Hamid Sultan J:

[1] This is my judgment in respect of the consolidated Suit Nos D-22–880 of 2008 and S-22–708 of 2009.

[2] The defendant in suit No '880' and the first defendant in suit No '708' is the same person and for purpose of convenience will be referred to as the first defendant. The first defendant was the director (not shareholder) and/or general manager and later demoted to deputy general manager of the plaintiff in 2003 because of a boardroom tussle. The plaintiff brings this action in essence for breach of fiduciary duty and duty of fidelity, conspiracy etc. The other defendants in suit No '708' consist of the previous employees of the plaintiff as well as the 11th defendant whom the first defendant is associated with upon leaving the plaintiff's employment

[3] What is important and unusual in this case is that the plaintiff has filed

this suit about five years after the first defendant had left the employment. There was no contemporaneous objection at any point of time more so when there was an Industrial Court case between the plaintiff and the first defendant which was commenced as early as the year 2004. In fact I have before the commencement of trial enquired with learned counsel for the plaintiff whether a similar claim against an employee (not shareholder and director) based on a stale and sterile complaint without contemporaneity (or words to the effect) had succeeded. Learned counsel for the plaintiff has assured me there was, but none was produced in the bundle of authority to match the peculiar facts of this case.

[4] This issue of sterile and stale complaint is very material to this case to assess the bona fide and/or the credibility of the evidence on many of the issues raised by the plaintiff as most of the allegations, evidence of the witnesses are one which can be categorised as hearsay, speculative or inchoate. What is essential to note is that the plaintiff's complaint throughout the proceedings is related to the conduct and motive of the first defendant in relation to managerial decision without any credible evidential basis. I must say surmise and conjecture itself is not sufficient to succeed against an employee or former employee. The court ought to frown at any vindictive and venomous attacks on employees when the employee leaves the firm to greener pastures or to earn a living elsewhere and attempts are made to oppress the employees by the former employer through court process, more so when they have diligently contributed to the success of the business without any complaint from the employer during the term of office.

[5] Jurisprudence relating to restraint of trade are some of the areas which recognises free flow of movement of talent of one employment to another, unless contractually restraint from doing so within the parameters of the law. The court often takes the extra step to protect the interest of the employee rather than the employer unless they make out a clear case of breach within the norms, of the law as opposed to speculation, surmise that too nearly five years after the employment. In *Magnifine Sdn Bhd v Yap Mun Him* [2005] 6 MLJ 413, Richard Malanjum J (as he then was), on the facts observed:

> There was no kind of agreement restraining the defendant from setting up rival business upon leaving the plaintiff. Indeed there was no fiduciary duty against legitimate competition between directors (including employees) with a company upon resignation.

[6] In the instant case it must not be forgotten that the first defendant was only a director and not a shareholder. A claim for breach of fiduciary duty and/or fidelity in decision making process after five years, more so when there was immediate Board of Directors (who are shareholders) in the hierarchy,

supervising the ordinary course of business, must be taken into consideration in the assessment of bona fide of the plaintiff's case. This is relevant and material to the factual matrix of the case, as learned counsel for the defendant in the submission has alleged the claim to be highly dubious.

[7] Hie parties have relied on the following cases: *Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd & Ors* [2008] 8 MLJ 450; [2008] 9 CLJ 546; *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632; *Markwell Bros Pty Ltd v CPN Diesel (Qld) Pty Ltd & Ors* (1982) 7 ACLR 425; *MPI Polyester Industries Sdn Bhd v Eng Koo Kiang & Ors* [2011] 8 CLJ 236; *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984] 1 MLJ 85; *Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, (deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303; *Rayner Segismond Balagut & Anor v Saaid bin Abdullah & Ors* [2012] 7 MLJ 55; *Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors* [1999] 5 MLJ 421; *Tenaga Nasional Bhd v Kesang Trading Sdn Bhd & Ors* [2002] 6 MLJ 1; *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297; *Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors & Another appeal* [2005] 3 CLJ 753; *Caley Ototo Worldwide Sdn Bhd v Sun Wen Long* [2009] 9 MLJ 1; [2010] 1 CLJ 725; *Aik Ming (M) Sdn Bhd & 0rs v Chang Ching Chuen & Ors & another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639; *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1; *SCK Group Bhd & Anor v Sunny Liew Slew Pang & Anor* [2011] 4 MLJ 393; [2010] 9 CLJ 389; *Magnifine Sdn Bhd v Yap Mun Him* [2005] 6 CLJ 413; *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324.

BRIEF FACTS — SUMMARY OF THE DEFENDANT'S CASE

[8] The summary of the defendants' case as set out by learned counsel for the defendants reads as follows:

The Plaintiff in both these suits are claiming against the Defendants' for the following:

(i) Suit No. D-22-880-2008

(a) the Plaintiff is claiming against the 1st Defendant for breach of his fiduciary duties and duty of fidelity to the Plaintiff whilst serving as a General Manager and/or Director for the Plaintiff during the period of 2003; and

(b) the Plaintiff is also claiming against the 1st Defendant for inducement to commit breach of contract by inducing and/or procuring one Tg Muhamad Solihhene bin Tengku Abdullah, which is the 7th Defendant in the 2nd Suit, a former employee of the Plaintiff to breach his contract of service and to leave the Plaintiff in order to work for one Asia Experience Tours Sdn. Bhd.

(ii) Suit No. S-22-708-2009

(a) the Plaintiff in this Suit is claiming against all of the Defendants jointly and/or severally for conspiracy to injure the Plaintiff; and/or

(b) further and/or in the alternative the Plaintiff in this Suit is also claiming against all of the Defendants jointly and/or severally for conspiracy to defraud the Plaintiff.

[9] The defendants' defence is as follows:

> The Defendants' defence is that these aforesaid suits are brought against the Defendants as a result of an afterthought and with mala fide intent The 1st Defendant, in particular, was constructively dismissed by the Plaintiff on 04.12.2003 and had initiated an Industrial Court action vide Industrial Case No. 2674/-1338/04 and was subsequently awarded the sum or RM 328,448.00 as compensation on 06.02.2008 vide Award No. 220 of 2008. During the entire period of the full trial at Industrial Court which commenced in the mid of 2007, these allegations were never once raised at all by the Plaintiff through any of its witnesses. In fact, even whilst under the employment of the Plaintiff nearing to the 1st Defendant's constructive dismissal, the Plaintiff had never raised these allegations nor charged him with such offences whilst he was still under the employment of the Plaintiff. Despite applying for a review of the Industrial Court's Award No, 220 of 2008 vide Judicial Review in March, 2008 and having heard the application in the High Court later on, the Plaintiff again never once raised such allegations before the Court. The High Court has affirmed the Industrial Court Award and the matter is now pending on appeal at the Court of Appeal.
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> It is only after the 1st Defendant had succeeded in his industrial court action and was awarded compensation in the sum of RM328,448.00 on 06.02.2008, did the Plaintiff then immediately filed its first suit on 30.05.2008 vide Writ of Summons and Statement of aaim dated 29.05.2008 and 25.08.2008 respectively which was followed by the second suit vide Writ of Summons and Statement of Claim dated 05.10.2009.
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> Therefore, in a gist, the Defendants are denying all and/or any of these allegations made by the Plaintiff, particularly when such allegations have only arisen recently in 2008 but are for offences or misconducts which are allegedly related for the periods between 2002–2003 which is some 5 or 6 years later.

[10] The agreed facts read as follows:

(a) The Plaintiff ('Mayflower') is a private limited company incorporated in Malaysia with its registered address at 62-68, Jalan Ipoh, 51200 Kuala Lumpur.

(b) Mayflower is and was at all material times a total travel service specialist in Malaysia offering a diversified range of services including corporate

ticketing, car rental, ground transportation, packaged tours, agent representation, tailor-made tours, meeting, convention and events.

(c) Mayflower is and was at all material times a subsidiary of Warisan TC Holdings Berhad ('Warisan TC'), a company listed on the main board of Bursa Malaysia.

(d) The first Defendant ('Ngiam Foon') is an individual with an address at No 21, Jalan Sri Hartamas, 15, Taman Sri Hartamas, 50480 Kuala Lumpur.

(e) Ngiam Foon was at the material time a director and employee of Mayflower.

(f) Ngiam Foon joined Mayflower as a Deputy General Manager on 16 May 1988, and was the General Manager of Mayflower from 1 January 1994 until 3 December 2003.

(g) Ngiam Foon was appointed a Director of Mayflower with effect from 1 January 1999 but was not re-elected as a Director at Mayflower's Annual General Meeting held on 30 April 2003.

(h) Ngiam Foon as Director and/or General Manager was the head of Mayflower at all material times.

(i) By virtue of being a Director of Mayflower, Ngiam Foon owed to Mayflower under common law, in equity and under s 132 of the Companies Act, 1965 the following fiduciary duties:

(i) a duty to act honestly and in good faith;

(ii) a duty to exercise his powers for the benefit of Mayflower and solely for the purposes for which they were conferred;

(iii) a duty to act bona fide in the best interests of Mayflower; and

(iv) a duty not to act so as to place himself in a position in which his personal interests did or might conflict with the interests of Mayflower.

(j) Further or alternatively, as an employee or General Manager of Mayflower, Ngiam Foon owed to the plaintiff under common law, in equity and contract, inter alia, the duty of fidelity to act faithfully and honestly in the best interest of Mayflower.

(k) Ngiam Foon left Mayflower on 4 December 2003.

(l) Shortly after leaving Mayflower, Ngiam Foon in January 2004 joined Asia Experience Sdn Bhd ('AE').

(m) The second Defendant, Normah binti Kadir deceased ('Normah Kadir'), was an employee of Mayflower from 1 September 1993 to 31 December 2002.

(n) Upon leaving Mayflower, Normah Kadir joined the 11th Defendant ('AE Tours') and was appointed a director of AE Tours effective from 5 July 2003.

(o) Normah Kadir had since passed away on or around 14 July 2008.

(p) The third Defendant, Cheah Siew Kuan ('Mary Cheah') resides at No 44, Lorong Bandar, Off Batu 3, Jalan Klang, 58100 Kuala Lumpur and was an employee of the Mayflower from 2 June 1994 to 6 January 2003.

(q) Upon leaving Mayflower, Mary Cheah joined AE Tours.

(r) The fourth Defendant, Lo Ying Hwa ('Verlyce Lo') resides at No 23, Jalan 16/62B, Bandar Menjalara, Kepong, 52200 Kuala Lumpur and was an employee of Mayflower from 16 January 1992 to 8 January 2003.

(s) Upon leaving Mayflower, Verlyce Lo joined AE Tours.

(t) The fifth Defendant, Lim Sin Onn ('Nicholas Lim') resides at Block D, Unit D- 08-08, Damansara Suria Apartment, Persiaran KIP 1, Taman Perindustrian KIP, 52000 Kuala Lumpur and was an employee of Mayflower from 2 March 1996 to 21 January 2003.

(u) Upon leaving Mayflower, Nicholas Lim joined AE Tours.

(v) The sixth Defendant, Chan Hsien Jen ('Chan Hsien Jen') resides at No 23, Jalan 3/16B, Bandar Baru Selayang, 68100 Batu Caves, Selangor Darul Ehsan and was an employee of Mayflower from 12 May 1997 to 21 January 2003.

(w) Upon leaving Mayflower, Chan Hsien Jen joined AE Tours.

(x) The seventh Defendant, Tg Muhamad Solihhene bin Tengku Abdullah ('Tg Solihhene') resides at Kg Kelar, Tok Pukang, 17040 Pasir Mas, Kelantan and was an employee of Mayflower from 30 June 2000 to 22 January 2003.

(y) Upon leaving Mayflower, Tg Solihhene joined AE Tours.

(z) The eighth Defendant, Muhammad Daanish Wilson bin Chau or Wilson Chau Meng Yoong ('Wilson Chau') resides at No 1573, Jalan E3/4, Taman Ehsan Kepong, 52100 Kuala Lumpur and was an employee of Mayflower from 11 March 1996 to 27 January 2003.

(aa) Upon leaving Mayflower, Wilson Chau joined AE Tours.

(ab) The 9th Defendant, Augustine Vong Wai Kuan ('Augustine Vong')

resides at No. 69, Jalan Durian, Taman Cheras, 56100 Kuala Lumpur and was an employee of Mayflower from 25-9-1995 to 22-2-2003.

(ac) Upon leaving Mayflower, Augustine Vong joined AE Tours.

(ad) The tenth Defendant, Chong Swee Sin ('Chong Swee Sin") resides at No 34, Jalan Arasakesari 1, Taynton View Cheras, 56000 Kuala Lumpur and was an employee of Mayflower from 6 September 1999 to 28 February 2003.

(ae) Upon leaving Mayflower, Chong Swee Sin joined AE Tours.

(af) The eleventh Defendant, AE Tours is a private limited company incorporated in Malaysia with its registered address at No 42-B, Jalan SS6/8, Kelana Jaya, 47301 Petaling Jaya, Selangor Darul Ehsan and incorporated on 1 March 2001.

(ag) AE Tours was formerly known as Sri Danta Travel & Tours Sdn Bhd.

(ah) AE Tours is and was at all material times involved in the business of inbound travel, tours and car rental.

(ai) AE Tours is and was at all material times a wholly owned subsidiary of Alampac Sdn Bhd ('Alampac'). Alampac is and was in turn a wholly owned subsidiary of AE.

[11] The issues to be tried read as follows:

Suit No D6-22-880-2008

(1) Whether the Defendant ('Ngiam Foon') had committed the following wrongful and unlawful acts against the Plaintiff ('Mayflower') in breach of the fiduciary duties that he owed to Mayflower as a Director under common law, in equity and under section 132 of the Companies Act 1965 and/or the duty of fidelity to act faithfully and honestly in the best interest of Mayflower as an employee or General Manager of Mayflower.

1.1 By having encouraged, induced and/or caused 22 of Mayflower's former employees listed in paragraph 9 of the Amended Statement of Claim to leave their employment with Mayflower and to join a competitor, Asia Experience Tours Sdn Bhd ('AE Tours') that Ngiam Foon also joined.

1.2 By having without any good reasons and to the detriment of Mayflower caused and/or instructed that the following 8 former employees of Mayflower to be accorded preferential treatments when they resigned from Mayflower:

(i) Cheah Siew Kuan, Mary;

(ii) Verlyce Lo Ying Hwa;

(iii) Lim Sin Onn, Nicholas;

(iv) Chan Hsien Jen;

(v) Tg Muhamad Solihhene bin Tengku Abdullah;

(vi) Wilson Chau Meng Yoong;

(vii) Augustine Vong Wai Kuan; and

(viii) Chong Swee Sin.

1.3 By having instructed Ms. Tan Kim Lian, the Human Resource Manager of Mayflower at the material time, to waive the salary in lieu of notice that the 7 former employees listed in paragraphs 1.2 (i)-(iv), (vi)-(viii) above were liable to pay to Mayflower for their early release from Mayflower's employment.

1.4 By having instructed Ms. Tan Kim Lian to waive the liquidated damages that Tg Muhamad Solihhene bin Tengku Abdullah, the former employee listed in paragraph 1.2 (v) above, was liable to pay to Mayflower for breach of his contract of employment with Mayflower.

1.5 By having instructed Ms. Tan Kim Lian to pay the 7 former employees listed in paragraph 1.2 (i)-(iv), (vi)-(viii) above salary in lieu of notice while it was they who were contractually obliged to pay salary in lieu of notice of their resignation to Mayflower.

1.6 By having instructed Ms. Tan Kim Lian to pay Tg Muhamad Solihhene bin Tengku Abdullah the former employee listed in paragraph 1.2 (v) above, one (1) month salary in lieu of notice when Mayflower was not contractually obliged to make such payment to him at all.

1.7 By having without any good reasons and to the detriment of Mayflower caused and/or authorised a payment of RM9,250.00 to Normah binti Kadir although she had by then left Mayflower to join AE Tours.

1.8 By having failed to act bona fide in the best interest of Mayflower and without any good reasons and to the detriment of Mayflower caused, allowed and/or authorised the use of Mayflower's resources to assist in the operations and business of AE Tours which was and still is a competitor of Mayflower.

(2) Whether Ngiam Foon had unlawfully interfered in the business of Mayflower by inducing and/or procuring Tg Muhamad Solihhene bin Tengku Abdullah to breach his contract of service and leave Mayflower in order to work for AE Tours.

(3) Whether Mayflower sufferred loss and damage resulting from Ngiam Foon's breach of his duties and unlawful interference in the business of Mayflower.

Suit No S-22-708-2009

(1) Whether the 1st' to 11th Defendants (or any 2 or more of them) had

sometime in the years 2002 and 2003 wrongfully and with intent to injure the Plaintiff ('Mayflower') and/or to cause loss to Mayflower by unlawful means conspired and combined together to defraud Mayflower.

(2) Whether the 1st to 11th Defendants (or any 2 or more of them) had sometime in years 2002 and 2003 conspired and combined together wrongfully and with the sole and predominant purpose of defrauding Mayflower and/or injuring and/or causing loss to Mayflower by:

2.1 Setting up the 11th Defendant, Asia Experience Tours Sdn Bhd ('AE Tours') whilst still employees and in the case of the 1st Defendant ('Ngiam Foon') also a director of Mayflower for the purpose of establishing and carrying on a 1 business with so far as possible the employees, confidential information, business opportunities, contracts, suppliers and customers of Mayflower.

2.2 Encouraging, inducing and/or causing employees of Mayflower to leave their employment with Mayflower and to work for AE Tours.

2.3 According preferential treatment and authorising wrongful payments to key staffs who decided to leave Mayflower in order to work for AE Tours.

2.4 Procuring breaches of contracts between customers of Mayflower with Mayflower so as to divert business away from Mayflower to AE Tours.

2.5 Neglecting their duties whilst still employees and in the case of Ngiam Foon also a director of Mayflower for the purpose of causing loss to Mayflower and/or to divert business away from Mayflower to AE Tours.

2.6 Causing, allowing and/or authorising the use of Mayflower's resources to assist in the operations and business of AE Tours.

(3) Whether Mayflower suffered loss and damage resulting from the wrongful acts and conspiracy of the Defendants.

PRELIMINARIES

[12] Five witnesses gave evidence for the plaintiff and one witness gave evidence for the defendants. None of the plaintiff's witness statements, individually or collectively attempts to set out the elements of breach, or tort complaint of save that Mr Chin Ten Hay ('PW2') who is the main witness in general attempts to allege that extra payment which was wrongful was paid to the employees who left the plaintiff and later joined the rival company. There was no credible allegation to say that the first defendant and/or others who were responsible for the payment had no authority. None of the current directors at the material time had come to the court to complain that the first defendant had breached any of the contractual obligations in making the payment. PW2 himself joined the plaintiff only in the middle of June 2004.

There were also no contemporaneous documents or notes at the material time circulating among the directors and key managerial staff that the first defendant had misconducted himself in his position as the general manager, deputy general manager and/or director. The other witnesses statements and evidence were sketchy, consist of hearsay statement, speculative views, surmise and conjecture which have no probative value taking into consideration the factual matrix of the case.

[13] I have heard the evidence, read the documents and submissions of the parties in detail. I am grateful to the learned counsels for their comprehensive submissions in encls 55, 56, 58 and 59. It will serve no useful purpose to repeat the same save to deal with the core issues. After giving much consideration to the plaintiff's case and the submission of the learned counsel for the plaintiff I take the view the plaintiff's case must be dismissed. My reasons, inter alia, are as follows:

(a) The first defendant Ngiam Foon, is a highly qualified person and had worked for the plaintiff for nearly 15 years bringing much success to the plaintiff. He was a victim of a boardroom tussle and he was perceived to have supported a particular group which resulted in his loss of the position as director as well as executive director of the plaintiff on 30 April 2003. The date is important as most of the allegations by the plaintiff relating to the former employees relates back to events which happened before he was removed from prime position after which he treated himself as constructively dismissed and brought an action in the Industrial Court, which he succeeded. No reasonable mind will say that he will attempt to act against the interest of the plaintiff before his unfortunate removal as a director and/or executive director.

(b) The learned counsel for the plaintiff relied on cases such as: (i) *Simmah Timber Industries Sdn Bhd* and (ii) *Tenaga Nasional Bhd* to drive home the point that a claim in the nature of fiduciary duty, conspiracy can succeed some years of the happening. I agree with such proposition. Cases must be distinguished on its own facts. For example, in *Simmah Timber Industries Sdn Bhd*, it was against shareholders who were directors of the company having some level of control over the business affairs of the company. In the instant case, the first defendant whatever label his position was, he was only an employee subject to appropriate control within the management and in the hierarchy of the plaintiff. His decision has its own check and balance by the plaintiff.

(c) In the instant case, the primary complaint is in relation to conduct and/or motive on managerial decision of the first defendant which is a matter if genuine ought to have been brought up at the earliest opportunity. To say that it was only discovered pursuant to an audit that too done in 2007 when these matters ought to have been ventilated by the manager and directors who are involved in the running of business at the earliest opportunity in my view lacks bona fide. In addition, the reasons advanced

by the plaintiff through the witnesses stretch the hearsay rule to suit the convenience of the plaintiff, to trumpet a claim against the defendants. Further, PW2's evidence that in 2003 the plaintiff's state of affairs was messy when he was not than in employment with the plaintiff and the plaintiff's hearsay allegation it was only detected by audit in 2007 is contradictory and compounds the problem as to the truth of the allegations.

(d) I have read the first defendant's evidence a number of times and compared and contrasted with the witnesses' evidence of the plaintiff. My conclusion is that the first defendant is a forthright and honest witness and a victim of circumstances who was forced to leave the plaintiff which he must have slogged to build and join a relatively new concern to earn a living in uncertain environment.

(e) In the instant case none of the directors who at the material time were instrumental in the running of the plaintiff gave evidence. In my view failure of the directors to give evidence is fatal, taking into consideration the factual matrix of the case and the fact that the allegation of the plaintiff is related to the conduct and motive of the first defendant in the decision making process of the plaintiff in respect of the employees and also other business clients which the plaintiff claims had caused loss and damage.

(f) What the plaintiff did was they placed PW2 who joined the plaintiff on 16 June 2004 to be the main witness. Taking the factual matrix of the case and the ongoing dispute of a personal nature between the plaintiff's Board of Directors it cannot be said, PW2's evidence will be the 'best evidence' as prima facie his evidence will stand as hearsay evidence and one of speculation with motive to frame liability on the defendants.

(g) In addition I must say PW2 is not a forthright and honest witness and had attempted to give evidence in favour of the plaintiff in matters which he has no personal knowledge. There are many instances of this nature in the witness statement for example in WSPW2, Q 88, where he states:

> Mayflower was left in a mess when these former employees left Mayflower in bulk to join Asia experience tours. There were no experience staff, if at all, to handle inbound travels, hotel contacting, wholesaling and international sales as all the key personnel had left Mayflower.

(h) PW2's evidence lacks credibility and was a person who was very economical with the truth and refused to answer questions during cross examination. The failure of the plaintiff to call material witnesses as advocated by learned counsel for the defendants in para 71 of encl 56 and the jurisprudence relating to adverse inference has much merit, more so of the creative allegations of the plaintiff which lacks bona fide and truth to cause hardship to the first defendant and previous employees, are matters which ought not to be condoned by the court.

(i) I must again reiterate that the plaintiff's complaints are not bona fide and is an afterthought and is a vindictive attempt to oppress further the first

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defendant using the court, in frivolous and vexatious manner with no corporate decency or conscience and this act is a frown to industrial jurisprudence taking into consideration the contribution the first defendant during his term of office had rendered to the plaintiff. I agree with learned counsel for the defendants that the plaintiff has not made out a case for breach of fiduciary duty or duty of fidelity or conspiracy etc; as claimed by the plaintiff.

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(j) It is my finding that the plaintiff has not established its case according to law. I accept the evidence of the first defendant and find much merit in the defendants' submission and find the issues to be tried in favour of the defendants.

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[14] For reasons stated above I dismiss the plaintiff's claim. After hearing the issues as to costs, I make the following orders:

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(a) the plaintiff to pay the defendants costs in the sum of RM30,000; and

(b) the defendant to pay allocatur before extraction of order for costs. Deputy registrar to issue the certificate of allocatur.

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[15] I hereby order so.

Claim dismissed with costs.

Reported by Ashok Kumar

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